Supreme Court, U.S.
FILED
APR 10 1998
CLERK

No. 97-1496

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

LOUIS H. RAWSON,

Petitioner,

v.

TOSCO REFINING COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The California Court of Appeal, First Appellate District

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a State may permissibly provide that state-prescribed overtime pay rates do not apply to parties to a collective bargaining agreement that contains its own overtime pay provisions.

RULE 29.6 STATEMENT

Respondent Tosco Refining Company is a division of Tosco Corporation. Tosco Corporation, a publicly-owned corporation, has no parent corporation and no nonwholly-owned subsidiaries.

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BRIEF IN OPPOSITION

Respondent Tosco Refining Company ("Tosco") respectfully submits this brief in opposition to the petition for a writ of certiorari.

OPINIONS BELOW

The opinion of the California Court of Appeal, First Appellate District (Pet. App. 1a-7a) is reported at 57 Cal. App. 4th 1520 (1997). The opinion of the Superior Court for the State of California, County of Contra Costa,

granting summary judgment (Pet. App. 8a-10a) is not reported.

JURISDICTION

The judgment of the Court of Appeal of the State of California, First Appellate District, was entered on September 30, 1997. The California Supreme Court denied a petition for discretionary review on December 23, 1997. The petition for a writ of certiorari was filed on March 11, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (1994).

STATEMENT

1. Petitioner has been employed by Tosco as a refinery unit operator since September 8, 1992. He has been a member of the bargaining unit represented exclusively by the Oil, Chemical and Atomic Workers International Union Local 1-5, AFL-CIO ("Union") during his entire employment. *See* Appellant's Appendix in Lieu of Clerk's Transcript ("C.A. App.") at 181-82. Since at least 1944, Tosco's refinery has operated 24 hours a day, seven days a week, and its refinery operators, among other positions that must be staffed around the clock, work on shift schedules, consistent with industry practice. *Id.* at 183-84.

Provisions concerning overtime pay for Tosco's refinery workers have been negotiated with the Union and made a part of the collective bargaining agreement ("CBA") for more than 50 years. C.A. App. at 183-84. The CBA contains overtime pay provisions particularly appropriate to the refining industry and tied to the shift schedule. Those provisions provide for time and one-half for all hours worked over eight hours in a 24-hour period. *Id.* at 184-85 In some cases, that premium rate is paid for hours that

otherwise would not be eligible for overtime compensation under state law.[1]

Effective February 1, 1996, the Union and Tosco agreed to a new, three-year contract, reaffirming those overtime wage provisions. That contract was ratified by an overwhelming majority of the bargaining unit members. C.A. App. at 182-83.

2. Petitioner filed this action in the Superior Court of the State of California, County of Contra Costa, on September 26, 1995, alleging that he and his fellow union workers at Tosco are entitled to a higher rate of overtime pay than is provided for under the terms of the CBA.

Under California law, the State's Industrial Welfare Commission has authority to promulgate wage orders setting forth rates of pay for employees in particular industries. *See* Cal. Labor Code § 1173 (Deering 1998).[2] Industrial Wage Commission ("IWC") Wage Order 1-89,

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[1] For example, employees are paid overtime for the entire first hour of overtime, even if they work only a portion of the hour, CBA, § 7.013; C.A. App. at 184-85, and are paid overtime for all work on the first day of a new schedule if the schedule is changed with less than 40 hours notice. CBA § 7.011(d); C.A. App. at 184-85. Moreover, workers subject to the CBA are entitled to a minimum of four hours of pay if they are called to return to the refinery after a regular shift of eight hours, even if they do not work the entire four hours (or any of it). (CBA, § 7.014; *see* C.A. App. at 184-85)

[2] There are 15 wage orders, each covering particular industry occupations, such as professional and technical, public housekeeping, transportation, broadcasting, motion picture, amusement and recreation, and agricultural.

the order applicable to the refining industry, provides that employees who work more than twelve hours in a single day (or more than eight hours in the seventh day of the workweek) must be paid at least double the regular rate of pay for that overtime. 8 Cal. Code Reg. §11010(3)(A)(2). IWC Wage Order 1-89(3), however, sets forth an exemption from the order's overtime-pay requirements:

> Except as provided in subsections (C) and (E)[3], this section shall not apply to any employee covered by a collective bargaining agreement if said agreement provides premium wage rates for overtime work and a cash wage rate for such employees of not less than one dollar ($1.00) per hour more than the minimum wage.

8 Cal. Code Reg. §11010(3)(F). Petitioner's theory in bringing suit was that this exemption was preempted by federal law, because *Livadas v. Bradshaw*, 512 U.S. 107 (1994), established that the State may not deny him the benefit of state-law protections simply because he is covered by a collective bargaining agreement.

3. On cross-motions for summary judgment, the Superior Court dismissed petitioner's complaint in its entirety. The court disagreed with petitioner that *Livadas* has any application to cases, like this one, where state law merely permits employees or their unions to contract out of default rules provided by state law. The Superior Court explained that *Livadas* expressly noted that its reasoning "should cast no shadow on the validity of these familiar and

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[3] Those subsections, not relevant here, apply to overtime rates for minors and provision of meal facilities.

narrowly drawn opt-out provisions." Pet. App. 9a (quoting *Livadas, 512 U.S. at 132*). The court also rejected petitioner's argument that *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983), required the wage order exemption to contain a "clear and unmistakable waiver." The court noted that *Metropolitan Edison* "involved a 'no strike' provision in a collective bargaining agreement" and thus was simply "not on point." Pet. App. 9a.

4. The California Court of Appeal, First Appellate District, affirmed. The court examined the holding of *Livadas*, and in particular the portion of the opinion that addressed provisions in state and federal laws that draw distinctions between union and nonunion represented employees, and noted this Court's recognition that "virtually all" such provisions are alike in that "union represented employees have the full protection of the minimum standard, absent any agreement for something different." Pet. App. 4a (citing *Livadas*, 512 U.S. at 131). The court then focused on the question whether the wage order exemption at issue in this case is a "valid opt-out provision which is not preempted" under *Livadas*. Pet. App. 4a. Relying upon federal authority in support of its position, and in particular this Court's decision in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), the Court of Appeal held that the state wage order exemption was not an impermissible intrusion into the collective bargaining process. Pet. App. 5a-6a.

The Court of Appeal also rejected petitioner's contention that the exemption is invalid "because it does not require the collective bargaining agreement to contain a 'clear and unmistakable waiver' of his state law rights as an employee to double time pay." Pet. App. 6a. The court distinguished the cases upon which petitioner based his argument on the ground that petitioner had not cited to any

statute prohibiting contractual agreements for different overtime pay rates than those established by the wage orders. Pet. App. 6a-7a.

5. The California Supreme Court denied further review on December 23, 1997. Pet. App. 11a.

REASONS FOR DENYING THE WRIT

Petitioner renews his contention that IWC Wage Order 1-89 is inconsistent with *Livadas*. The Court of Appeal correctly resolved that claim, and its decision does not conflict with any decision of this Court or of any other court. Further review is therefore not warranted.

I. The California Court of Appeal Correctly Rejected Petitioner's Interpretation of *Livadas*

1. Section 7 of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 157 (1994), guarantees employees the right to bargain collectively, and Section 8(a)(1), 29 U.S.C. § 158(a)(1) (1994), makes it an unfair labor practice for an employer to impede an employee's exercise of that right. Because this Court has recognized that the NLRA confers rights "on employees and not merely as against the employer," *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 109 (1989) (citation omitted), however, state laws that nullify the rights of employees under the NLRA have been held to be preempted under the Supremacy Clause. *See, e.g., Nash v. Florida Indus. Comm'n*, 389 U.S. 235, 239-40 (1967) (invalidating state law that denied unemployment benefits to persons who, as permitted by the NLRA, had filed an unfair labor practice charge).

Livadas involved a narrowly circumscribed application of that principle. In that case, California law required that

all wages earned and unpaid at the time of an employee's discharge be paid upon discharge, and it provided a penalty for non-compliance with that requirement. *See* 512 U.S. at 111-12 (discussing Cal. Lab. Code §§ 201, 203 (Deering 1991)). California's Labor Commissioner, however, had a policy of refusing to enforce claims for untimely payment of final wages where the claim was brought by an employee who was covered by a collective bargaining agreement that contained an arbitration clause. This Court held that the Commissioner's policy was preempted by federal law because it predicated state law benefits on refraining from joining a union, conduct protected by Section 7 of the NLRA. *See* 512 U.S. at 110.

The distinction between this case and *Livadas* is plain. The CBA that covered Livadas' employment had *no provision whatsoever* concerning the time for payment of final wages; nevertheless, the Labor Commissioner's policy resulted in the rejection of her claim simply because she was a member of a union that had negotiated a CBA governing *other* terms and conditions of her employment. In this case, state-law benefits are not predicated on refraining from conduct protected by federal labor law. Rather, the California wage orders recognize such protected conduct by permitting unionized workers to choose — they may decide through collective bargaining how they should be paid premium pay for overtime work. In the absence of such a provision in a collective bargaining agreement, they will be covered by the wage order. The wage orders thus permit parties to "opt in" or "opt out" of the state-law overtime wages. It has long been settled that such freedom to "contract out of" state minimum labor standards is perfectly consistent with federal labor law. *See Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 22-23 (1987) (noting that "[t]he fact that the parties are free to devise

their own . . . arrangements . . . strengthens the case that the statute works no intrusion on collective bargaining").

Indeed, *Livadas* itself recognized and emphasized the importance of this distinction:

> While the Commissioner and her *amici* call our attention to a number of state and federal laws that draw distinctions between union and nonunion represented employees, . . . virtually all share the important second feature observed in *Coyne*, that union-represented employees have the full protection of the minimum standard, absent any agreement for something different. *These "opt out" statutes are thus manifestly different in their operation (and their effect on federal rights) from the Commissioner's rule that an employee forfeits his state law rights the moment a collective-bargaining agreement with an arbitration clause is entered into.*

512 U.S. at 131-32 (emphasis added). Accordingly, in invalidating "the Commissioner's unusual policy" this court "cast no shadow on the validity" of such opt-out provisions. *Id.* at 132. The courts below hardly committed error in faithfully heeding that admonition.

2. Petitioner fares no better by characterizing the issue, in passing, as one involving the standard of "waiver" that applies in cases like this one, and by contending that the "waiver" must be "clear and unmistakable." Pet. 6-7. That contention scarcely lends support to petitioner's basic claim that the Court of Appeal departed from *Livadas*, since this Court made perfectly clear in *Livadas* that *no* waiver issue was before it: Not only was it clear that the right at issue was expressly made non-waivable by

California law (*see* 512 U.S. at 111, n. 3, *citing* Cal. Labor Code § 219 (Deering 1991)), but also "[t]here [was] no suggestion . . . that Livadas' union sought or purported to bargain away her protections under § 201 or § 203 . . .." 512 U.S. at 125.

Metropolitan Edison Co. v. NLRB, 460 U.S. 693 (1983), which petitioner also cites (Pet. 6), is even farther afield. In that case, employees of Metropolitan Edison, represented by the Electrical Workers Union, engaged in unlawful strikes against the company, in violation of the "no-strike" clause in their collective bargaining agreement. On each occasion, the company disciplined the union officials more severely than the other union members. The union filed grievances regarding the disparate treatment, and the arbitrator upheld the company's action on the ground that union officials have an affirmative duty to uphold the terms of the collective bargaining agreement. Several years later, employees of the company refused to cross an informational picket line, and the company again imposed harsher disciplinary penalties on the union officials. The union filed unfair labor practice charges against the company, and the company took the position that the prior arbitration awards were sufficient to impose a *contractual* duty on the union officials to cross the picket line. The company based its entire "waiver" argument on the fact that the union had lost two previous arbitrations on the issue, and had remained *silent* in subsequent contract negotiations. In rejecting the company's claim, this Court "recognized that a union may waive a member's statutorily protected rights," 460 U.S. at 705, but it concluded that, in the case before it, "[t]here [had been] no showing that the

parties intended to incorporate [the earlier arbitral awards] into the subsequent agreement." *Id.* at 709-10.[4]

Here, the overtime provision with which petitioner disagrees is expressly set forth in the collective bargaining agreement. Petitioner cites no authority for his unusual contentions that federal law requires the legislated exemption to contain a "clear and convincing waiver" requirement, or that the CBA provision must enumerate all of the overtime provisions that are *not* intended to be part of the parties' agreement. In fact, it is difficult to see how the agreement in this case could fail to meet *any* standard of waiver that might conceivably apply. That petitioner is forced to argue that his own standard of "explicitness" is *not* satisfied by "[e]xpress agreement" (Pet. 6) persuasively demonstrates the insubstantiality of his position.

II. Petitioner Does Not Allege A Conflict, And There In Fact Is No Conflict, On The Issue Decided By The Court Below

Petitioner does not even attempt to allege that the lower courts are in need of guidance on the meaning of *Livadas*, that the question he raises is recurring and important to litigation in other areas of the country, or that this case

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[4] It is clear that the *Metropolitan Edison* case did not deal with parties' rights to *bargain collectively* over the terms and conditions of their employment. The Court described the scope of its holding as involving "the narrow question . . . whether an employer may *unilaterally* define the actions a union official is required to take to enforce a no-strike clause and penalize him for his failure to comply." 460 U.S. at 700.

meets any other of the traditional prerequisites to this Court's plenary review.

To the contrary, the only other appellate court to consider the validity of California's exemptions has agreed with the conclusion reached by the courts below. In *NBC v. Bradshaw,* 70 F.3d 69 (9th Cir. 1995), the Ninth Circuit recognized the validity of a wage order exemption for employees covered by a collective bargaining agreement, *identical to the exemption challenged here.* In *NBC*, as here, the Wage Order covering employees in the broadcasting industry, number 11-80, also contained an exemption for collective bargaining agreements, identical to the exemption of IWC Wage Order 1-89, and the union made the same argument advanced by petitioner in this case — that *Livadas* compelled the court to hold that the exemption was preempted by federal law and therefore invalid. The court disagreed, and held that the exemption was a valid "opt out" provision upon which *Livadas* had no impact:

> [The union has] asked that we affirm the district court on the ground that the intervening Supreme Court decision in *Livadas* requires us to hold Wage Order 11-80's § 3(F) exemption invalid. We cannot accept this position as the Court in *Livadas* stressed that its holding "cast no shadow on the validity of . . . familiar and narrowly drawn opt-out provisions." *Livadas*, 114 S. Ct. at 2082. California has tailored such an opt-out provision in § 3(F) of Wage Order 11-80.

70 F.3d at 73; see also *Viceroy Gold Corp. v. Aubry*, 75 F.3d 482, 489-90 (9th Cir. 1996) (same). No other appellate decision has so much as discussed the issue. In

these circumstances, petitioner has offered no persuasive reasons for this Court's intervention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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April 10, 1998